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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 374

FRANCIS L. HARMON,

Petitioner,

vs.

RUTH ELIZABETH HARMON,

Respondent.

Petitioner's Brief in Reply to Respondent's Opposition to Petition for a Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

FRANCIS L. HARMON,
628 North Beachwood Drive,
Los Angeles 4, California,
Petitioner pro se.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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STATUTE

United States Code, Title 28, Sec. 1257(3) 1

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As is perhaps evident without this brief, the Respondent's Brief in Opposition to the Petition for a Writ of Certiorari serves chiefly to point up the crying need of the People of the State of California for the assistance of the United States Supreme Court. When a state's law enforcement agencies refuse to follow the law, there is little that an unorganized and suffering populace can do other than beseech this Court for assistance.

Jurisdiction.

Respondent's Brief concedes that all technical jurisdictional requirements imposed by 28 U. S. C. Section 1257(3) are satisfied by addressing itself solely to a claim that the federal questions presented to not relate to the case or are "a matter of state practice."

REPLY TO ARGUMENT.

Introductory.

Respondent's argument commences by asserting that "Petitioner's contentions are largely wide of the mark * * *." From Respondent's viewpoint this is certainly true. But that is because the "mark" at which he is gazing is a shifting cloud of subtle sophistry drifting over a pool of quicksand. However, your Petitioner is looking in another direction directly at *his* "mark", its "bulls-eye" consisting of the marble-like Constitution of the United States located at the center of "the law of the land."

The manner in which this proceeding has been conducted is so far removed from normal judicial procedure that from its inception it has been difficult to know just what the issues are and what stand the respondent takes on them. It is like fighting a mythical dragon: you cut off one head and two others grow out in opposite directions. However, your petitioner will attempt to bring some order to the chaos of respondent's argument and comment on the points he has raised.

The Father's Duty to Support Is Separate From His Right of Custody?

Never. It never was the law. It is not the law. And while there is a Constitution, it can not become the law. Such a preposterous statement is not only illegal and unconstitutional, but may aptly be described as one which shocks the conscience. It is as absurd as arguing that robbing banks and putting men in prison are wholly separate, Q.e.d. We will put all men in prison and we definitely don't want to be bothered with such unrelated matters as facts and the law.

The origin of this nonsense can be traced if we begin not much more that a hundred years ago when it was not open to dispute that a father had the absolute right to the custody of his minor children. In return for this right, it was said that he had a duty to support them. However, in time and to cover situations involving vicious conduct toward children, the courts evolved the theory that the "duty of support" and "right to custody" were *separable* (*not* "separate") for grave and sufficient reasons. As divorce became the fad in some states the "reasons" may have reached the vanishing point, but that is another problem. Nevertheless, it has only been within the last ten years that the promoters of the Support Act have been substituting the word "separate" for "separable," thinking that no one would notice the difference. The time is overdue for pointing out the difference between these two words in no uncertain terms. "Separable" means by a judicial proceeding in accordance with due process of law. "Separate" simply can not be considered.

The Ruling on "Legal Custody" of the Child.

Throughout these proceedings the respondent has been running in circles around the issue of "legal custody." In his brief filed in the District Court of Appeal (p. 16, line 17) respondent evades the issue by stating "It reaches the point of absurdity to state that in this case the mother's custody of her own daughter is illegal." However, your petitioner pointed out at some length in his DCA Reply Brief (pp. 8-9) that her custody in fact was definitely illegal.

Since the Support Act by its own terms *requires* that the person bringing the action in behalf of a minor must have "legal custody," it is obvious that there are but two

ways of viewing the opinion of the District Court of Appeal: either (1) it overrules the United States Supreme Court and holds that respondent has "legal custody" of the child, or (2) it is on its face in violation of the very Act under which the proceedings are brought. Caught in this situation, all the respondent can do is argue that the question "is not in the case." However, as set forth *supra*, if we still have a constitution and law, the question is very much in the case.

A Large Percentage of the Persons Seeking Support Payments Under This Act Are Destitute?

Everything is relative. When compared to the income of the Attorney General, ninety per cent or more of the population is destitute. But as generally understood, the fact is that the statement is completely untrue. Your petitioner has studied this situation for more than two years, has examined the register of actions of 10,000 cases, has sat through hearings of several hundred cases and has examined the files of several hundred other cases. In addition he has conferred with the county auditor's office and appraised the situation in the court, the district attorney's office and the probation office. Thus it is likely that he knows more about the operation of this Act than the court, the district attorney, the attorney general and Professors Ehrenzweig and Brockelbank combined and the situation is *not* as they picture it. Whether or not they actually believe their own propaganda is a moot question, but the fact is that almost never will you find a father who has just wandered off and left his children. It just doesn't happen except in the rarest of cases. The more typical situation is that by force of arms some divorce mill has broken up his home and turned his children over to some unfit, incompetent mother to be brought up as

ne'er-do-wells, and somewhat understandably he leaves the state that has broken up his home and is making tramps out of his children.

He remarries using more care to select a good wife this time and has more very young children. His ex-wife has married some "character," her children are old enough not to require her constant attention and she is employed. They're living pretty high, but if she could lay her hands on a few extra bucks, she could be drinking whisky instead of beer, so she files one of these actions . . . why not? It's all for free. So the court enters one of these orders against him. Does he pay it? You can bet he doesn't. His wife is tied up with the young children and can't work, he is making payments on a house and everything in it and he can't or won't pay it. So what do you do now, professors? Throw him in jail? Five days is the maximum in California. That wouldn't worry him much, except that he may lose his job. Incidentally, there aren't enough jails in California to hold them all. Fine him? It's his family that suffers. And there aren't enough hours in the day and days in the week to have hearings on the matter. Even now they're hearing the *new* cases evenings and on Saturdays. The result is that except in some unusual case, no hearings are even attempted to enforce the order. Instead writs of execution are issued to his employer about every three months and the sheriff collects anywhere from nothing to $30 or $40 representing one-half of what the employer happens to owe him on that day. If the employer is tolerant, this isn't so bad, but some employers don't like it and he's out on the street. So is his family. They'll likely lose their home and end up on relief, but these figures don't show up on the professor's balance sheet. So in 1956, one way or another they collected about $40,000. Quite a record. That was

for about 5,000 cases. At an average of $8 per year per case one can not help but wonder how many were removed from relief rolls because of it. And what did it cost the taxpayers of Los Angeles County to put on this show? According to figures obtained from the county auditor's office, it appears that on a pro rata basis the bookkeeping expense alone was on the order of $50,000. On top of this we have a staff in the court clerk's office and another large staff in the district attorney's office, and more in the probation office, to say nothing of the court itself. It is doubtful that $150,000 would cover the cost of running this show for the year. However, the program receives considerable television and newspaper publicity and there's no telling how many wives have been induced to desert their homes as a result of it, to find out too late that it doesn't work out as advertised. This is without doubt the biggest and worst boondogling project ever foisted on the American public and the sooner we are rid of it, the better. How long will it be before some one wakes up to the fact that this problem must be solved by not breaking up homes in the first place instead of trying to figure out what to do after breaking them?

"Choice of Law" Not Involved in Case?

At first glance it is not evident that "choice of law" is involved in the case, although careful analysis may develop that it is on principles closely allied to those set forth in *Stromberg v. California*, 75 L. Ed. 1117, 51 S. Ct. 532, 283 U. S. 359 at 367-368. In any event it is immaterial to the granting of certiorari whether this question is involved when there are six other vital questions of national im-

portance remaining. If it should develop that it is not involved the Court in rejecting it could nevertheless provide some badly needed dicta on the subject.

Real Party in Interest.

This is a point not only of substantial constitutional significance, but of vital importance to all children of broken homes. In all too many cases, not only of this type, but ordinary divorce actions, money is being turned over to irresponsible women who have broken up their homes to be used for the support of children when in fact most of it is devoted to their own nefarious activities with the children getting the benefit of what may be left over. All such money should be strictly accounted for the same as if the child had inherited money from someone.

For good and sufficient reasons it has been long settled that a lawsuit may not be prosecuted in the name of someone other than the "real party in interest" and

> A state may not make anything due process of law which by its own legislation it chooses to declare such. *Davidson v. City of New Orleans*, 96 U. S. 97, 24 L. Ed. 616.
>
> A state may not, by prescribing what shall constitute due process of law subtract anything from the rights recognized and established as due process in the federal Constitution. *King Tonopah Mining Co. v. Lynch*, 232 Fed. 485.

Respondent's Brief also identifies this as being a federal question in his paragraph entitled "Jurisdiction," thus rebutting his later contention that it is merely a matter of state practice.

The Vagueness of the Duty of Support.

The only clear and correct statement in Respondent's Brief appears in the first paragraph on page 6, where it says "There is nothing vague or unclear in the statute's reference to 'duty of support'; it is simply an incorporation by reference of the applicable law."

The vagueness lies in the fact that no one connected with the administration of the Act knows, or will admit, what is the "applicable law." As set forth at length in the Petition, in considering the statute the Supreme Court must follow the interpretation thereof by the state court and therein lies the vagueness. Under these circumstances we need the law spelled out in unmistakable language so that it can not be misinterpreted, as it has been.

Conclusion.

In arguing that the federal questions presented are in his opinion "not in the case," Respondent does not deny that these questions arise daily throughout the United States in the lives of the public, nor does he deny that they are of such character that the answers given them determine more often than not the entire future of the people whose lives they touch. He does not try to deny that the answers the court below has given these questions will, if permitted to stand, consistently lead hereafter to gross injustice to the individuals concerned, and moreover that the situation thus engendered is such as to increase crime and juvenile delinquency throughout the United States on such a scale as to imperil the national security. Instead

Respondent makes the assertion, unsupported by any authority, that the decision is "clearly correct" although it flies in the face of numerous cases cited in the Petition, which cases are representative not merely of the "weight of authority" but of *all* of the authority upon the questions presented.

Wherefore, Petitioner urges that the Respondent has shown no valid reasons why certiorari should not be granted and in fact has but emphasized by an arbitrary attitude the vital necessity to the welfare of American Citizens everywhere that the Petition *should be* granted.

Respectfully submitted,

FRANCIS L. HARMON,

Petitioner pro se.